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In The

Supreme Court of the United States

October Term, 1994

JAMES R. KLAUSER, EUGENE G. MARTIN, EDWARD E. HALES, MAUREEN J. BUSBY, RICHARD H. LILLIE, and NICHOLAS HURTGEN,

Petitioners,

v.

MARSHALL BURKES,

Respondent.

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I.

The Trustees Had a Reasonable Belief that Burkes' Speech Was Not Protected.

The essential facts before this Court are what reasonable officials in the position of the trustees could reasonably believe about the content, form and context of Burkes' statements to the Attorney General and the State Auditor, and what reasonable officials in the position of

the trustees could reasonably believe to be the facts in the balance of interests required by *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), and the cases in the circuits interpreting *Pickering*. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (immunity to be decided on the basis of "information the [officials] possessed"); *Waters v. Churchill*, ___ U.S. ___, 114 S.Ct. 1878, 1889, 128 L.Ed.2d 686 (1994) (First Amendment analysis should proceed on the basis of "the facts as the employer reasonably found them to be"); *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 536 (1991) (if there is any reasonable basis in the facts to conclude that defendants acted within the law, they are immune).

Burkes does not dispute the limited information he gave the trustees regarding his speech activity[1], except he argues that the chart showing the alleged fees and the statement he made to the trustees on the day he was fired should have put them on notice that he could not be fired without violating the First Amendment. Neither of those pieces of information would have led a reasonable trustee to believe that Burkes was speaking on a matter of public concern, or that his speech interests outweighed their duty to effectively manage the agency in the public interest.

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[1] Burkes acknowledges his statements to the trustees immediately after his visits with the Attorney General and State Auditor (A. App. 94–99; Burkes' response 8–9), and at the June 23, 1989, meeting where he was fired (R. App. 1, 7–10). He does not dispute he told the trustees that he knew of no illegal or even inappropriate acts on the part of anyone (R.14:4:¶6). He concedes that the substance of his "concerns" were "reflected in the [list of] questions" he left with the two officials (Burkes' response 8); and admits that the trustees did not know about those questions at the time they fired him (A. App. 95–98).

Burkes gave the trustees charts at the June board meeting purporting to "disclos[e] the nature and amount of [Mr. Gerrard's] fees" (Burkes' response 7). The charts did nothing of the sort. In May, 1989, Burkes ordered Paul Fanfera, head of the Investment Board's real estate division, to prepare a chart of the real estate transactions in which Mr. Gerrard was known to be involved, without regard for whether those projects had ever been approved or disapproved by the Investment Board (R.19:¶¶2, 28–30). All of the amounts shown on the charts, whether the project was approved or disapproved, were in line with industry practice (R.19:7:¶30). Indeed, of the projects listed on the charts, the Board had funded only one (R.34:¶¶42–43: Exhs. A, B).[2] Contrary to Burkes' averments (Burkes' response 6; R.34:¶38), the brokerage commissions on the projects at issue were always available to the Board because they were part of the project budgets (R.19:¶30; R.28:¶13).

Burkes stated in his deposition that he was ignorant of practices in the real estate industry.[3] The

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[2] The chart ordered by Burkes shows that one project had been funded in the approximate amount of $10.5 million, for which three real estate brokers equally shared a $216,000 commission (2% of total price) (R.35:¶42: Ex. A).

[3] Burkes stated in his deposition that he was ignorant of practices in the real estate industry (R.25:13–14:¶34):

Q Do you have any general knowledge of what the practice is in the real estate industry regarding the evaluation of fees?
A No, I'm not an expert in that area.
Q Do you have any experience in your past employment regarding the evaluation of the magnitude of fees?
A Not specifically.
****

Board understood, as Burkes apparently did not, that a real estate broker is paid by and obligated to the seller, not the buyer; that commission splitting is an accepted practice in the real estate industry; and that it would be inappropriate for the Board to rely on any work done by a seller's broker (R.19:¶¶25–26; R.28:¶¶12, 15). Moreover, on June 23 Burkes responded to a question from one of the trustees by admitting that he himself had approved the real estate transactions in question, and admitting that three of the four transactions had not yet been funded (R. App. 2, para. 5).

It was reasonable for the trustees to view the charts as an inaccurate and misleading piece of information in light of their knowledge about their own practices and the practices in the real estate industry. No reasonable trustee would have inferred from the charts that there was a need for disclosure, that anyone was receiving excessive fees, that the Board should be deciding what fees were paid to brokers by its investment partners, or that the one brokerage fee for an approved project shown on the charts was an example of influence. The reasonable conclusion was that the charts were nothing more that a self-serving reiteration of the real estate policy disagreement Burkes had with the trustees two weeks earlier (R.15:5:¶13, Exh. H). *Waters*, ___ U.S. at ___, 114 S.Ct. at 1888 (government manager should be permitted to exercise professional judgment about credibility and character in determining what conclusions to draw from the circumstances).

Burkes refers the Court to the text of the statement he read to the trustees at the June 23, 1989,

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Q Do you know what the industry practice is in the real estate industry about evaluating, about the buyer's evaluation of the seller's brokers fee?

A Not specifically.

meeting just before he was discharged (R. App. 7–10).[4] As demonstrated in the following paragraphs, however, the content and context of Burkes' June 23 statement added nothing to what the trustees already knew about Burkes' speech: they knew only that he had expressed concern about the fee disclosure policy they had recently considered and rejected, had expressed concern about unspecified "influence," and had assured the trustees that he had no knowledge that anyone had done anything illegal or even improper (Cert. petition, pp. 5–6; A. App. 94–99; R.14:4:¶6).

Burkes attempts to breathe content into his vague assertion of "concern" about "influence" by insinuating that his June 23 statement to the trustees should have alerted them that he was warning them about a matter of public concern; i.e., "Mr. Gerrard's influence over the trustees and intimidation of staff" (Burkes' response 20). The trustees refer the Court to Burkes' appendix, which demonstrates otherwise (R. App. 9–10). The meeting minutes indicate that the trustees understood Burkes only to say that "[Burkes] has been concerned about claims of influence peddling and feels intimidated by Mr. Gerrard" (R. App. 1).

Contrary to Burkes' assertion, he did not tell the trustees on June 23 that Mr. Gerrard had influence over the them, and did not tell the trustees that Mr. Gerrard had intimidated staff. He did not tell the trustees that he had made such accusations to the two state officials he

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[4] Burkes did not argue before the Wisconsin Supreme Court that his June 23 statement added anything to the trustees' knowledge of the content of his speech.

visited a few days prior.[5] Instead, Burkes told the trustees that Mr. Gerrard did not keep a promise to respond to Burkes, told them he felt intimidated by Mr. Gerrard, and told them he asked the two officials to approve the pending real estate transactions.

None of Burkes' June 23 statements can be fairly characterized as "attempting to focus the attention of two agencies upon the Investment Board's use, or possible misuse, of public funds," as suggested by the Wisconsin Supreme Court (A. App. 19). Mr. Gerrard's alleged failure to keep a promise to Burkes is not a matter of public concern, nor is Burkes' feeling of intimidation by Mr. Gerrard. If Burkes wanted to suggest to the trustees that anyone had done anything improper, he did not do so on June 23. In short, Burkes' June 23 statement to the trustees corroborates their position that they knew only that Burkes had expressed vague concerns about the fee disclosure policy they rejected two weeks prior and about unspecified "influence," all the while maintaining that no one had done anything illegal or improper. The trustees learned nothing new from what Burkes said on June 23.

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[5] Burkes suggests that the trustees probably knew what he said to the two officials, because agency legal counsel Keith Johnson attended both his visits to the officials and the special trustee meeting on June 20, citing to the record (Burkes' response 10). The record establishes that staff, including Messrs. Zobel and Bauch, were present for the discussion of Burkes' mismanagement of The Company Store loan renegotiation, but not for the trustees' other discussion about Burkes. The minutes of the June 20 meeting state: "The trustees asked staff to leave the meeting and engaged in a lengthy discussion of [Investment Board] personnel and management issues in general. They also discussed personnel and management issues relating to the Executive Director" (R.15:Ex. I).

Burkes' response concentrates virtually all of its attention and arguments on alleged (and disputed) facts and inferences from those facts which, if believed, would tend to show that the reasons proffered by the trustees for Burkes' discharge were pretextual, and that they were actually motivated to discharge him because of his speech activities. Burkes asserts that these factual inferences on the merits of his retaliation claim defeat the trustees' qualified immunity. However, Burkes ignores the clearly established law that motivation is not an issue when deciding qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) ("[A] claim of immunity is conceptually distinct from the merits of the plaintiffs' claim that his rights have been violated"). This Court can therefore disregard Burkes' assertions of fact and inference regarding the trustees' motivations for his discharge. The qualified immunity issues stated in the trustees' petition do not depend in any way upon their motivations for discharging Burkes.

II.

Burkes' Response Makes No Arguments Refuting the Reasons the Writ Should Be Granted.

Burkes' cursory discussion of the legal issues in this case ignores the trustees' arguments that the writ should be granted because the Wisconsin Supreme Court's analysis unlawfully inhibits public employers from exercising their judgment in the public interest.

Burkes' assertion that the trustees' petition does not comply with Rule 10.1 (Burkes' response 16), is without merit. The questions presented and the entire body of the petition demonstrate that the petition meets the criteria of Rule 10.1(b) and (c).

Burkes' response ignores the trustees' argument that courts must not substitute their hindsight view of the circumstances surrounding a discharge for what reasonable public employers knew at the time the action had to be taken. Burkes does not explain why the Wisconsin Supreme Court's rejection of the reasonable inferences made by the trustees, in favor of inferences drawn solely in Burkes' favor, is appropriate under existing precedent. Burkes does not explain how the Wisconsin Supreme Court's analysis furthers the policy of qualified immunity to encourage fearless decisionmaking in the public interest. Burkes argues only that the inferences about his speech most favorable to him support the conclusion that he was speaking on a matter of public concern (Burkes' response 21–26).

Burkes criticizes the precedent cited by the trustees which supports the legality of the discharge by arguing that the precedent was not "closely analogous" (Burkes response 22–24). That argument makes the same fundamental burden-shifting error that was made by the Wisconsin Supreme Court. The trustees have no obligation to produce precedent which permits them to fire Burkes; Burkes must produce closely analogous precedent which prohibited the discharge. *Davis v. Scherer*, 468 U.S. 183, 197 (1984) (plaintiff bears burden of showing clearly established law). Only Burkes had any obligation to produce closely analogous cases which would have put the trustees on notice that they could not discharge the key managerial employee in the agency when they reasonably believed he had mismanaged the agency to the point of breakdown if they knew the employee had expressed vague concerns about agency policy and influence.

Burkes does not defend the propriety of the inference-drawing procedure used by the Wisconsin Supreme Court on the qualified immunity standard. He argues instead that the trustees knew more than they

have claimed, but his arguments in that regard are unconvincing in light of the faulty information on the charts and the failure of Burkes himself to tell the trustees what he said when he had the opportunity to do so on June 23. Burkes then proceeds to eliminate *Pickering* factors which favor the trustees on the theory that summary judgment methodology permits courts to consider only those inferences in Burkes' favor. For instance, he argues that the trustees could not consider as part of the *Pickering* balance their beliefs about his abysmal performance, their beliefs about the management breakdown that had occurred, the importance of Burkes' position to the effective functioning of the agency, or their beliefs about the potential disruptiveness of his statements (Burkes' response 26-27). Burkes does not explain how a public employer, invariably faced with competing inferences in these situations, could ever act if the speech was arguably on a matter of public concern. The inference drawing procedure advocated by Burkes and adopted by the Wisconsin Supreme Court reads the *Pickering* balancing test out of the immunity analysis where an employee's speech is arguably on a matter of public concern.

Hunter v. Bryant, 502 U.S. 224, 112 S.Ct. 534 (1991), establishes the proper standard for qualified immunity on summary judgment where the reasonable belief of the decisionmaker is an element of the constitutional claim. Burkes dismisses *Hunter* and *Anderson v. Creighton*, 483 U.S. 635 (1987), as probable cause cases (Burkes' response 25). Yet, both of these cases deal with the core question presented in the petition, which is whether a summary judgment motion based on qualified immunity must be measured against the decisionmaker's objectively reasonable beliefs even if the inferences are unfavorable to the plaintiff, or whether a court may consider only those factual inferences favorable to the plaintiff. The trustees urge this Court to accept this case for review, and make explicit the holdings

implied by *Hunter* and *Anderson*, that public employers are entitled to qualified immunity in First Amendment retaliation claims if any reasonable inferences from the facts support the lawfulness of an employment action.

Respectfully submitted,

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